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Personnel Manual
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Material Transmitted:

HHS Instruction 304-1, Appointment of Experts and Consultants

Material Superseded:

HHS Instruction 304-1 (all)

Background:

This Instruction has been revised consistent with recent changes in the organization of HHS, and in support of HHS administrative initiatives calling for more streamlined rules and greater delegations of authority; the amendment of 5 U.S. Code 3109 requiring the Office of Personnel Management (OPM) to regulate the employment of experts and consultants; and newly issued OPM regulations governing the appointment of experts and consultants.

This issuance streamlines the rules and supplements the new statutory and regulatory requirements above.

Any reference to "OPDIV" in this Instruction now includes the PHS agencies, the Office of the Secretary, the Program Support Center, HCFA, ACF, and AOA.

This Instruction is effective immediately. Implementation of this issuance must be carried out in accordance with applicable laws, regulations, and bargaining agreements.

Filing Instructions:

Remove superseded material and file new material. Post receipt of this transmittal to the HHS Check List of Transmittals and file this transmittal in sequential order after the check list.

Eugene Kinlow
Deputy Assistant Secretary for Human
Resources, OASMB

INSTRUCTION 304-1

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HHS PERSONNEL INSTRUCTION 304-1
APPOINTMENT OF EXPERTS AND CONSULTANTS

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304-1-00 PURPOSE AND COVERAGE

This Instruction supplements OPM regulations, 5 CFR Part 304, covering appointments made under 5 U.S.C. 3109 as amended, including those to advisory groups, and states policies and requirements for the employment of experts and consultants who serve in an individual capacity and whose appointments are excepted from the competitive service examination, position classification, and the General Schedule pay rates. This Instruction also covers appointments made under statutory authorities other than 5 U.S.C. 3109 which are not covered by OPM regulations. However, the provisions of this Instruction do not apply when consultant services are obtained by contract (see 304-1-30B).

304-1-10 REFERENCES

- A. U.S. Code 3109, as amended (law - experts and consultants)
- B. U.S. Code 1342 (law - prohibition on voluntary services)
- C. U.S. Code 209(f) and (h) (law - Public Health Service)
- D. Section 503 of Public Law 102-394 (law - Department's Fiscal Year (FY) 1993 Appropriations Act)
- E. CFR Part 304 (regulations - experts and consultants)

304-1-20 LEGAL AND REGULATORY AUTHORITIES

- A. Section 3109 as amended. Title 5, United States Code

This statute is a Government-wide authority for the employment of experts and consultants for temporary or intermittent service without regard to the civil service or classification laws. The FY 1993 Appropriations Act for the Department authorizes its use for FY 1993 and subsequent fiscal years. That appropriations

act does not cover the Indian Health Service and the Food and Drug Administration, so they are not authorized to appoint experts and consultants under 5 U.S.C. 3109. If any other part of the Department is covered by a different appropriations act, that act must be reviewed to determine whether it authorizes the use of 5 U.S.C. 3109.

Those Operating Divisions (OPDIVs) which are authorized to use 5 U.S.C. 3109 may either use that authority or any other appropriate authority. Other authorities are discussed below.

B. Specific Statutory Authorities for the Public Health Service

Under section 209(f), title 42, United States Code, special consultants may be appointed to advise and assist in the operations of the Public Health Service. The term "special consultant" in section 209(f) includes both consultants and experts as those terms are used in this Instruction. Appointments under 42 U.S.C. 209(f) may be made without regard to civil service laws. Pay may be fixed without regard to classification laws. In accordance with 42 U.S.C. 209(h), non-citizens may be appointed under section 209(f) without regard to the restriction against paying persons who are citizens of countries not allied with the United States.

There are three statutory authorities which permit officials in NIH, and one statutory authority which permits officials in SAMHSA, to use the authority under 5 U.S.C. 3109, as amended to obtain the services of a specified number of experts and consultants without regard to the limitation in that section regarding the number of days or the period of service.

C. Other Statutory Authorities

If an OPDIV wishes to use a statute other than those shown in 304-1-20 A and B above to employ an expert or a consultant to serve in an individual capacity, the authority must be examined to determine whether it provides for appointments to be excepted from the competitive service and duties to be exempted from classification laws.

D. 5 CFR Part 304

These are OPM regulations governing the appointment of experts and consultants under 5 U.S.C. 3109, as amended.

E. Schedule A Authority

OPM has established two Schedule A authorities under which experts and

consultants may be appointed - Schedule A 213.3102(k) and 213.3102(1). By policy, neither of these authorities will be used in HHS.

304-1-30 POLICIES FOR EMPLOYMENT OF EXPERTS AND CONSULTANTS

A. General

1. When expert and consultant appointments are made under one of the authorities listed in 304-1-20, the services to be performed must be ones that are properly covered by those authorities; the persons employed must be experts or consultants by definition; the needed services must be of such a nature that they can be met by an appointment of one year or less-- unless the appointment is made under a statutory authority permitting a longer term.

Experts and consultants will not be employed in HHS to fill positions that are subject to competitive civil service examination, position classification? and the General Schedule pay rates, or in cases where regular employees are available and have the skills and knowledges to perform the work. Nor will consulting services be obtained to bypass or undermine personnel ceilings, pay limitations, or civil service appointment procedures.

2. Neither a consultant nor an expert may be assigned to perform the duties of a continuing, full-time position. While experts may serve as team leaders or directors of projects for which they were hired, neither experts nor consultants may make final decisions on substantive policies or functions in the agency chain of command.

B. Obtaining Services Through Appointment Procedures

Ordinarily, when a person serves in an individual capacity as an expert or consultant, an employer-employee relationship is created. Though Department officials do not exercise the same degree or kind of supervision and control over an expert or consultant that they do over regular employees, nonetheless in obtaining the services of an individual as an expert or consultant, the Government becomes an employer of that individual in a limited sense. When an employer-employee relationship will exist, expert and consultant services will be obtained only through the appointment procedure.

A procurement contract may be used only when an employer-employee relationship will not exist.

Experts and consultants appointed under 5 U.S.C. 3109 are subject to appointment restrictions contained in 5 CFR 304. Experts and consultants appointed under other statutes are not subject to those limitations. However, OPDIVs making such appointments must ensure that appointments are continued only as-long as necessary.

304-1-40 PAY, LEAVE, TRAVEL, AND OTHER BENEFITS

A. General

Several different factors or conditions of employment determine an expert or consultant receives for his/her services, and the individual's entitlements under pay, leave, travel, and other laws and regulations. These factors or conditions are discussed in the subsections which follow.

B. Rate of Compensation

1. Heads of OPDIVs, or persons to whom they have delegated authority, will determine the appropriate rate of pay in each case (HHS Instruction 250-2 on setting rates of pay no longer applies to experts and consultants). Factors to be considered include:
 - a. The level and difficulty of the work to be performed;
 - b. The qualifications of the expert or consultant;
 - c. The pay rates of comparable individuals performing similar work in the Federal or non-Federal sectors; and
 - d. The availability of qualified candidates.
2. In accordance with the HHS appropriations act, the highest rate that can be paid to an expert or consultant appointed under 5 U.S.C. is Level IV of the Executive Schedule.
3. The rate of compensation for consultants appointed under 42 U.S.C. 209(f) may be set by the OPDIV head or his/her designee. The highest rate that may be paid is the rate for Level IV of the Executive Schedule.
4. The basis for compensation levels shall be documented in the Official Personnel Folder.
5. Experts and consultants may also serve without compensation, provided the individuals agree in advance in writing to waive any claim for

compensation for those services. 31 U.S.C. 1342 does not permit acceptance of voluntary service--that is, service furnished on the initiative of the person rendering the service without request from the Department. There is, however, no prohibition against requesting gratuitous service provided the individual serving without compensation is **not** assigned duties of a classified position (see Comptroller General decision 27 CG 194).

Personnel offices must make sure that the invitation and acceptance to serve without compensation are in the record. Form SF 50 to document and terminate the appointment will be prepared even though no compensation is to be paid.

C. Duty Basis

Experts and consultants may be appointed on a full-time, part-time, or intermittent basis. For appointments under 5 U.S.C. they are usually given appointments not to exceed 1 year or less. However, if they do not work more than 130 days in any service year, their appointments can be for longer than a year. Appointments under other statutes may be for more than a year regardless of how many days in a year the expert or consultant works.

D. Pay Basis

1. Experts and consultants may be paid on an hourly basis or on a daily basis. The basic difference between these two pay bases is that an expert or consultant paid on an hourly basis is paid at his/her hourly rate for each hour worked, whereas an expert or consultant paid on a daily basis is paid at his/her full daily rate for each day worked, regardless of the number of hours involved. At the time of appointment, experts and consultants may be assigned a daily or an hourly pay basis. Pay basis is documented on the SF 50 as a daily rate followed by "PD" or as an hourly rate followed by "PH." (See 304-1-40E.2 and F.2.) Pay must be on an hourly basis for any expert or consultant approved to perform duties away from the work site.
2. Regardless of the pay basis of an expert or consultant, his/her biweekly pay is still limited by law to an amount which does not exceed the biweekly rate of pay for Level IV of the Executive Schedule. For example, an expert or consultant being paid the maximum daily rate cannot be paid for work in excess of 10 days per pay period, since such pay would exceed the statutory maximum. Similarly, an expert or consultant being paid the maximum hourly rate cannot be paid for work in excess of 80 hours per pay period.

E. Intermittent Experts and Consultants

1. Duty Basis

An expert or consultant is appointed to serve on an intermittent basis when it is expected that he/she will work occasionally or irregularly.

2. Pay Basis

An hourly rate generally provides management the best continued control over costs. However, circumstances of some assignments (e.g., short-term assignments requiring travel) make it difficult to acquire services of highly qualified individuals on other than a daily basis. Whenever a consultant or expert appointment is made or extended, management must determine the most cost-effective basis of pay, hourly or daily. Pay must be on an hourly basis for any expert or consultant approved to perform duties away from the work site. In some working situations, it may be necessary to pay an intermittent expert or consultant on a daily basis for certain types of work and on an hourly basis for other types of work. In this situation, two appointments are made, and different appointment numbers must be used.

3. Leave Benefits

Intermittent experts and consultants are not entitled to leave benefits, since they do not work on a regularly scheduled basis.

4. Overtime Pay

Though it is possible for an agency to enter into an explicit agreement to pay an expert or consultant additional compensation at his/her regular rate for work in excess of 8 hours a day, the policy of the Department is that no such agreements will be made. Thus, experts and consultants, whether they are paid on a daily or hourly basis, will not be paid additional compensation for work in excess of 8 hours per day. This means that intermittent experts and consultants paid on an hourly basis will be paid at their regular hourly rates for each hour worked up to a total of 8 hours on any day. Intermittent experts and consultants paid on a daily basis are entitled to pay at their regular daily rate for any day on which they work, irrespective of the number of hours worked. Intermittent experts and consultants may, however, be paid for work on more than 5 days a week or 10 days a pay period provided the statutory pay maximum is not exceeded (see 304-1-40D.2). In the unusual event experts/consultants are covered by the Fair Labor Standards Act, overtime provisions of the Act must be

followed.

5. Holiday Pay

Intermittent experts and consultants are entitled to pay at their regular rates for work performed on a holiday. They are not entitled to receive pay for holidays on which they performed no work.

6. Travel and Per Diem

Intermittent experts and consultants may be paid for transportation expenses incurred in traveling between their homes or places of regular business and their places of employment. Intermittent experts and consultants may also be paid per diem in lieu of subsistence while at places of employment away from their homes or places of regular business. Program or administrative officers controlling travel must assure that only experts and consultants who actually work intermittently are eligible for these benefits. An expert or consultant who is designated intermittent but whose actual pattern of service is not intermittent is not eligible for these benefits. Payment of travel and per diem to an expert or consultant who is not eligible for these benefits is not only illegal, but can result in considerable hardship for the individual who is responsible for repaying any overpayments of this type.

F. Full and Part-time Experts and Consultants

1. Duty Basis

Although experts and consultants in this Department ordinarily work intermittently, they are sometimes employed to work on assignments requiring more frequent and regular service. Personnel offices must determine whether their tours of duty should be changed to full or part-time. While an expert or consultant who works more than 130 days in a year may still be working intermittently, the situation should be examined closely. When a regular tour of duty is established for an expert or consultant, it must be described in the remarks section of the SF 50. In addition, experts and consultants who are paid on an hourly basis must certify on a daily basis the time they worked.

2. Pay Rate

Department policy is that all full/part-time experts and consultants will be paid on an hourly-rate basis. If a daily rate is shown on the SF 52,

"Request for Personnel Action," the personnel or payroll office should convert the proposed daily rate to an hourly rate by dividing the daily rate by 8.

3. Leave Benefits

Full or part-time experts and consultants are entitled to earn and use annual and sick leave, since they work on a regularly scheduled basis. Their eligibility for annual and sick leave benefits must be indicated in the remarks section of their SF 50s. The rates of leave accrual, the conditions under which leave may be used, and the provisions of lump-sum payment for unused annual leave are the same for full or part-time experts and consultants as for other employees.

4. Overtime Pay

The overtime pay policy which applies to full or part-time experts and consultants is the same as that which applies to intermittent experts and consultants. They may be paid at their regular hourly rate for each hour worked up to a total of 8 hours on any day. However, they may be paid for work of more than 5 days a week or 10 days a pay period provided the statutory pay maximum is not exceeded (see 304-1-40D.2)

5. Holiday Pay

Full or part-time experts and consultants are entitled to pay at their regular hourly rates for holidays on which they perform work. In addition, they are paid at their regular rate for holidays when they perform no work when those holidays fall within their regular tour of duty. This latter entitlement must be documented in the remarks section of the SF 50, for example, "To be paid for holidays occurring within regular tour of duty whether or not work is performed." They will not be paid for holidays on which they perform no work and which fall outside their regular tour of duty.

6. Travel and Per Diem

- a. Unlike intermittent experts and consultants, full or part-time experts and consultants are not entitled to transportation expenses between their homes or places of regular business and their places of employment. Nor are they entitled to per diem in lieu of subsistence while employed away from their homes or places of regular business. However, they are entitled to the travel benefits payable to regular employees, including transportation expenses and per diem in lieu of subsistence while on official business away from their official duty stations.
- b. Excepted from the restriction on the payment of travel expenses from home to place of business are experts and consultants appointed pursuant to the special authorities for NIH and SAMHSA (see 304-1-20B).

G. Other Benefits

1. Commendation for Injury

Experts and consultants are covered during their period of service by the Federal Employees Compensation Act.

2. Fringe Benefits

Fringe benefit coverage determinations are made for experts and consultants in the same manner as they are made for other employees.

H. Employment of Retired Officers or Employees

Retired members of the uniformed services and retired civilian employees who are employed as experts or consultants are subject to the same reductions in pay as other retired employees who are reemployed. In rare situations, OPM may grant an exception. Requests for exceptions should be sent to the Deputy Assistant Secretary for Human Resources, OASMB.

I. Paying Salary for Time Spent in Traveling To and From the Individual's Home

Under HHS policy, experts and consultants are not paid their daily rate of compensation for the time they spend traveling to and from their duty stations. (See sections 304-1-40E.6 and 304-1-40F.6 for information on payment of the travel expenses themselves.)

J. Salary Increases

Experts and consultants are not entitled to the pay raises that are given to other Federal employees, unless provided for in the appointment document. (See 5 CFR 304.106(a).) However, in the absence of a documented provision for such pay adjustments, an office may at any time adjust the pay of an expert or consultant.

304-1-50 APPOINTMENT REQUIREMENTS

A. HHS Pre-Appointment Requirements

To make sure that laws covering expert and consultant appointments are properly applied, HHS has established the pre-appointment requirements set forth in the subsections which follow. (See 304-1-70 for post-appointment review requirements.)

B. Recording Duties and Qualifications

1. Form HHS-41O, "Supplemental Information - Expert or Consultant", must be completed when an expert or consultant appointment is made. This form is available through the usual requisitioning channels. It will be filed on the permanent side of the Official Personnel Folder.
2. The statement of duties must be (1) sufficiently detailed to show that the services to be rendered are ones for which it is appropriate to use the expert/consultant appointment authority, and (2) specific enough to permit determination whether the person's qualifications are relevant in light of the duties to be performed and whether there might be a conflict of interest with the person's private employment.
3. The Department requires that a detailed **Resume'** be submitted by applicants for expert and consultant positions. Qualifications information on the Resume' should identify the candidate's significant accomplishments or other factors which led the OPDIV to select him/her rather than someone else for the particular service. The qualifications information must be in sufficient detail to show that the person is an "expert" or "consultant".

C. Pre-Appointment Review

1. When an HHS organization hires an expert or consultant, final approval of the selection will be made by a management official to whom selecting authority has been delegated. This official must be at a level above the organization sponsoring the activity, except when the sponsoring organization is the immediate office of an OPDIV or STAFFDIV head.

The proposed appointment or extension will be reviewed in terms of:

- a. necessity for obtaining the individual's service,
 - b. correctness of the judgment that the duties to be performed require the services of an expert or consultant,
 - c. propriety of the designated duty basis,
 - d. soundness of the decision that this is the most appropriate appointment authority,
 - e. qualifications of the proposed appointee,
 - f. appropriateness of the proposed level of pay in relation to both the work to be performed and the qualifications of the proposed appointee,
 - g. completeness of documentation, and
 - h. absence of conflicts of interest.
2. Within HHS, Form HHS-41O (back side) will be used for the required pre-appointment certification. Some of the determinations must be made by the official who will utilize the services of the expert or consultant while other determinations must be made by the appointing official. For this reason, the actual signatures of officials with selecting and appointing authority are required.

D. Obtaining Financial Forms

Before an expert or consultant may be appointed, the appropriate financial forms must be obtained, and a determination must be made as to whether a conflict of interest, or an apparent conflict of interest, might result from the individual's appointment. This form must be kept current as long as the expert/consultant is on the Department's roll. (See 304-1-80.)

E. Investigative Requirements

1. Non-Sensitive Positions

Experts and consultants appointed to positions designated as Non-Sensitive (Level 1) are exempt from the investigative requirements of section 3(a) of Executive Order 10450 providing that reference checks are favorable and appointments do not exceed an aggregate of 180 days in either a single continuous or series of appointments. (See HHS Instruction 731-1, Personnel Security/Suitability Policy and Technical Guidance.)

2. Public Trust and National Security Positions

Experts and consultants appointed to sensitive positions designated as Public Trust or National Security positions (Levels 2-6) are subject to the investigative requirements of section 3(b) of Executive order 10450. Most investigations are conducted post-appointment; however, there may be pre-appointment requirements, such as a waiver request. Contact your organizations Personnel Security Representative. (See HHS Instruction 731-1.)

304-1-60 APPOINTING INDIVIDUALS ALREADY EMPLOYED BY THE FEDERAL GOVERNMENT

A. General Provisions

1. A person already employed by the Federal Government may be employed as an expert or consultant in this Department and receive pay for such employment only when (a) the other Federal appointments are for intermittent expert or consultant services; or (b) a determination is made that needed services may not otherwise be secured.
2. When such dual employment occurs, care must be taken to insure that:
 - a. There is no conflict of duties or hours of employment between or among the appointments;
 - b. If paid on a per hour basis, the individual does not receive pay for the same hours of the same day from more than one organization;
 - c. If paid on a per day basis, he/she does not receive pay for the same day from more than one organization;
and

- d. The individual does not receive travel expenses to or from the same location for the same day from two organizations.

B. Employing Full-Time Federal employees

1. A full-time Federal employee may be appointed to serve without compensation as an intermittent expert or consultant. Usual appointment procedures should be followed in such cases.
2. A full-time Federal employee shall not ordinarily be appointed to serve this Department on an intermittent basis as an expert or consultant and receive pay for such service. Such employment may be approved as an exception to the dual pay law (5 U.S.C. 5533) only if a determination is made that, because of unusual circumstances, the additional employment is in the public interest and the personal services cannot be readily obtained otherwise. This determination may be made by a personnel officer or designee.

C. Service as an Expert or Consultant Under More Than One Appointment

An individual who undertakes service as an expert or consultant under more than one appointment must inform each organizational component of his/her arrangement with the other. This requirement applies to appointments with different HHS components as well as agencies outside the Department. The two organizations must work together to track the total number of days the expert or consultant works.

D. Identifying Multiple Appointments

When an individual is appointed as an expert, consultant, or advisory committee member, a two-position number called an appointment number is automatically assigned. The appointment number is located on the last line of item 37 of the SF 50. If there are multiple appointments as an expert, consultant, or committee member, a different number is assigned to each one. Personnel offices must use the appropriate appointment number in processing any personnel actions or documents related to a particular appointment (see 304-1 -100A. 1).

304-1-70 ANNUAL REPORTING AND COMPLIANCE REQUIREMENTS

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A. Reporting Requirements

1. Program managers and appointing officials are responsible for assuring that the services rendered by consultant appointees continue to be those of an expert or consultant, that the duties of record are actually the ones being performed, and that time limits are being observed. In accordance with the statutory requirement in 5 U.S.C. 3109 (e) and the regulatory requirements in 5 CFR Part 304, agencies are to report the following information to OPM annually:
 - a. The number of days it employed each consultant; and
 - b. The total amount it paid each expert or consultant so employed

The Department will prepare this report centrally based on data contained in the personnel and payroll system.

B. Compliance Requirements

Each personnel office must establish and maintain a system of controls and oversight necessary to assure compliance with U.S.C. 3109, other statutes, 5 CFR Part 304, and this Instruction. This system must include:

1. Appropriate training and information procedures to ensure that officials and employees using the authority understand the statutory and regulatory requirements for appointing experts and consultants; and
2. Appropriate provisions for review of expert and consultant appointments.

304-1-80 STANDARDS OF CONDUCT

Experts and consultants must be given copies of Government-wide and Department standards of conduct regulations.

304-1-90 TIME AND ATTENDANCE REPORTS

For each bi-weekly period in which an expert or consultant performs services, a Time and Attendance Report must be prepared and transmitted. This applies to experts and consultants serving without compensation as well as those who are being paid.

304-1-100 TERMINATING AN APPOINTMENT

A. Action by the Program Office

1. Program offices must take prompt action to prepare and send to the personnel office an SF 52 terminating the appointment of an expert or consultant whose appointment has expired or whose services are no longer needed. Since an individual may hold more than one expert or consultant appointment in this Department, an appointment number is used to identify each appointment. This number is computer generated at the time an appointment is made, and it is shown as a two-digit number on the last line of item 37 of an SF 50. The SF 52 terminating an appointment must identify the number of the appointment for which the termination action is being requested.
2. Experts and consultants whose appointments have expired must not be asked to perform services after the expiration date of their appointment. Program offices must establish appropriate controls to make sure this does not happen.

B. Action by the Personnel Office

1. Personnel offices must establish procedures for notifying program offices when expert/consultant appointments are due to expire, and for making sure that an SF 52 to terminate or extend an appointment is received in time for action to be taken before the expiration date.
2. Personnel offices must make sure that the correct appointment number is entered on the SF 50 to identify the appointment being terminated.